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No. 05-7053

IN THE

Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 413 F.3d 520, 67 Fed. R. Evid. Serv. 630 (5th Cir. 2005).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 20, 2005. JA 325. The Court denied a petition for rehearing and rehearing *en banc* on July 20, 2005. The petition for a writ of certiorari was filed on October 17, 2005, and granted on January 13, 2006. The jurisdiction of this Court rests on 28 USC § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant portions of the Gun Control Act of 1968, as amended, §§ 922 and 924, are included as an appendix to this brief.

Fed. R. Crim. P. 52(a) provides:

> **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

In this case, petitioner's defense to firearms charges contended that she could not have formed the requisite criminal intent because she had no choice. She presented evidence that she was forced to engage in unlawful gun purchases by a boyfriend who repeatedly abused her and threatened the lives of her three daughters if she did not comply. The District Court, in accordance with Fifth Circuit precedent, instructed the jury that she had to prove her defense by a preponderance of the evidence, effectively converting her defense to the criminal intent element into a form of civil trial on that sole and dispositive issue in the case. The Fifth Circuit affirmed.

The Fifth Circuit's ruling is contrary to that of a significant majority of other circuits and states. In those courts, a defendant who asserts a duress defense must bear the burden of producing probative evidence. If that evidentiary burden is satisfied, the prosecution retains the burden of proving to the jury that the defense does not raise a reasonable doubt as to the defendant's criminal intent. The majority's is the better reasoned rule and is fully consistent with the development of federal and state common law in the last century. The majority rule also comports with this Court's interpretations of the requirements of the Due Process Clause in this context. As such, the majority rule brings a measure of fairness and integrity to confusing and conflicting conceptions of *mens rea* and affirmative defenses. For each of these reasons, the Court should reject the Fifth Circuit's anachronistic rule and reverse.

A. The Charges Against Petitioner.

On March 3, 2003, a federal grand jury of the Dallas Division of the Northern District of Texas indicted petitioner on nine firearms charges. JA 13-17. Count One of the indictment alleged that while she was under indictment for a crime punishable by imprisonment for a term exceeding one

year (conspiracy to possess a counterfeit check), she received seven firearms that had been transported in interstate commerce, in violation of 18 U.S.C. § 922(n). Counts two through nine of the indictment each alleged that Petitioner made a false and fictitious statement to a licensed firearm dealer, which was likely to deceive the dealer, relating to a fact material to the lawfulness of her acquisition of seven firearms and attempted acquisition of an eighth firearm. The alleged false statement in each case was the answer "no" to a question on a required Bureau of Alcohol Tobacco and Fireams ("ATF") background-check form (Form 4473) that asked whether she was under indictment or information in any court for a crime for which she could be imprisoned for one year or more. Counts two through nine each charged a violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). JA 14-16. Petitioner entered a plea of not guilty to the indictment.

Prior to trial, Petitioner secured authorization from the District Court for funds to hire an expert to evaluate petitioner in order to determine whether she was a "battered woman" and whether that circumstance in her life had a bearing on the charged conduct. The defense hired Dr. Toby Myers to conduct an examination of petitioner and to evaluate her history and circumstances in relation to the firearm purchases. Through sealed, and unsealed motions, the defense informed the Court that Petitioner would contend that she purchased the firearms under duress.

Prosecutors received ample notice of the intended defense in accordance with the District Court's order to do so pursuant to Rule 12.2(b), Fed. R. Crim. P.[1] JA 18-20.

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[1] Fed. R. Crim. P. 12.2(b):

Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney

Defense counsel gave notice by letter, further informing the prosecution that the defense intended to call Dr. Myers as an expert to testify on domestic violence and how it affects its victims. *Id.* Prosecutors then retained their own expert and moved for a compulsory examination of petitioner by that expert. Over defense objection, the District Court granted the motion. Petitioner complied under a District Court's threat that if she refused, the court would exclude the testimony of her own expert.[2]

B. Petitioner's Trial.

1. Prosecution Witnesses

The prosecution's evidence included the testimony of government attorneys who described for the jury the operation of the National Instant Criminal Background Check System ("NICS") and the function of ATF Form No. 4473 that is required for purchases from federally licensed gun dealers. SF 142-98.[3]

Prosecutors also called as witnesses each of the seven dealers from whom petitioner and her immediate companions, including her boyfriend, had purchased guns and the dealer from whom they had attempted to purchase another. Three of the sales occurred at a gun show at Market Hall in Dallas on

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for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

[2] The District Court later excluded Dr. Myers' testimony on the ground that it was "subjective." JA 253, 286-87. Accordingly, neither expert testified.

[3] Petitioner's citation form reflects the unusual lexicon of the Northern District of Texas and is as follows: SF is Statement of Facts (transcribed testimony and court proceedings); Tr. is Transcript (the record of pleadings, orders and other entries kept and prepared by the clerk of the court); Supp. Tr. (supplemental transcript); Doc. is document (numbered by the clerk when they are filed).

Saturday, January 4, 2003. The remaining four guns were purchased just one week later, January 11, at a similar gun show in Mesquite, Texas. The attempted purchase also occurred at the later gun show. That transaction was not completed because NICS instructed the dealer to delay the sale of the firearm. SF 410, 414, 417. Each and every one of the dealers who testified regarding petitioner's gun purchases and attempted purchase recalled that petitioner was accompanied by two or three young black males. JA 63, 65, 68- 69, 71- 72, 76- 78, 78-79, 81-82, 90-91, 92-94, 99-101, 102, 103.

Additional prosecution witnesses gave further support to the defense. Petitioner's landlord at the time of the gun purchases testified that petitioner lived at the Fall River Apartments along with her three children from December 2002 to sometime in February 2003. The landlord further testified that although the petitioner and her children were supposed to be the only persons living in the apartment, there were always young black men in and around the apartment. The landlord also testified that there was a patio window broken by a gun shot while petitioner lived in the apartment. SF 200-08. In addition, an ATF agent testified to a search of petitioner's apartment that yielded gun boxes and receipts connected to the purchases at issue, but none of the guns themselves.[4] There was no indication on the items that they belonged to petitioner. SF 257.

The parties stipulated that petitioner was under indictment and was aware that she was under indictment for a crime punishable by imprisonment for a term exceeding one year on the date of the sales and the attempted purchase.

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[4] When Petitioner was arrested, she told the agents there were three guns in her apartment because she had seen them three days before and did not know them to have been carried out of the apartment. Petitioner testified that the guns, the ammunition and the boxes all belonged to her boyfriend, Wright, and his accomplice. JA 194-95.

2. Defense Witnesses

The defense witnesses at trial included petitioner and two of petitioner's three daughters, aged 16 and 14 at the time of trial. Petitioner's daughters testified that their father and petitioner's former husband, Ted Dixon, had beaten and abused all of them. JA 131, 147-48. Petitioner divorced Dixon in 2001. JA 155. In August 2002, petitioner became romantically involved with Thomas Earl Wright, whose nickname is "Pacman." The girls testified that Wright and the petitioner got along well at the beginning, but the relationship became abusive. Wright would hit petitioner repeatedly and leave her stranded at home by taking her car and what little money she had. The girls and petitioner also testified that Wright administered his beatings in such a way as to hide the resulting marks, by hitting petitioner on her arms, legs and chest. Petitioner's clothes would cover the bruises. JA 108-10, 133-35. The testimony also established that petitioner ended the relationship, but that it later resumed on or about December 2002. *Id.*

All three defense witnesses testified to a significant increase in Wright's abuse of petitioner in connection with the gun shows in early January 2003. Petitioner explained that in late December or early January she overheard Wright and his friends talk about murders in which they had been involved. She had no idea that they had been involved in this sort of thing. JA 166-67. As petitioner and Wright's relationship deteriorated in January, Wright beat her more and she was not able to come and go by herself. Her daughters confirmed that petitioner had to be accompanied wherever she went by Wright or one of his friends. Her daughters testified that they were deeply frightened of Wright and his accomplices. JA 110-114, 135-38.

On the Friday night before the first gun show, Wright told petitioner that she was going to go with him and that she was going to buy some guns for him. Petitioner refused, which resulted in her being hit in the mouth, having a gun pointed at

her face and being threatened with death. JA 169-71. Wright's actions marked a significant escalation in the level of violence against petitioner. Wright told petitioner that if he had to kill her, he was also going to have to kill her children. *Id.*

The next day, petitioner, Wright, Wright's sister and two of his accomplices went to the gun show at Market Hall in Dallas. The children stayed at home. JA 171-72. When they arrived at the gun show, Wright instructed petitioner to do what he had told her to do. He warned her that somebody was at home with her kids and these individuals were just a phone call away. Petitioner testified that she was afraid and did not know what to do. JA 171. Wright and one accomplice, Cory "Hookie" Sanders, were with her and told her what to buy and to fill out the forms the way she was told. JA 172-73. Petitioner believed that if she did not buy the guns, Wright would hurt or kill her and/or her children. JA 175-77. Petitioner testified that she did not like buying a gun, had never owned a gun, had never shot a gun and did not want guns at her house. JA 178. Her daughters both testified that they had not seen their mother with a gun and that the guns belonged to Wright and his accomplices. JA 113-14, 135-36.

One of the purchases was a Tec-22 with a red laser. JA 175-76. In the week following the first gun show, Wright repeatedly pointed the Tec-22 at petitioner and her middle daughter, Joycelyn, in order to intimidate them. The eldest daughter, Queshia, testified that Wright would point the laser at petitioner and Joycelyn, and ask questions like "What do you know about this red dot?" JA 112. Joycelyn testified to Wright's use of the weapon in this fashion. Joycelyn also testified that when Wright pointed the red dot at her, he was pointing the gun at her. JA 136.

Petitioner also testified that Wright repeatedly trained the Tec 22 upon her, saying things like: "You don't think I will kill you, do you?" JA 179. Sometimes the gun was pointed

at her face and sometimes her chest. Petitioner was also present when Wright pointed the gun at her daughter. Petitioner testified that she was beaten four or five times that week, and that Wright would not allow her to go places by herself or to use the telephone. Petitioner testified that she was afraid to tell anybody about the abuse because she did not want anything to happen to her children. JA 178-80.

On the following Saturday, Wright awakened petitioner with a gun pointed at her. JA 180-81. Wright demanded that petitioner accompany him and another of his accomplices, Roderick, to a gun show in Mesquite. Sanders and another accomplice, Tyshon Hillary, remained at petitioner's apartment with her children. Wright told petitioner that she knew what to do. Petitioner understood that she was supposed to fill out the forms and buy the guns that they wanted. JA 181. Again at Wright's command and with money supplied by him, petitioner purchased four additional firearms that day. Wright demanded that she purchase two firearms, one for him and one for Roderick, JA 182, and further instructed her to buy two additional guns on behalf of two Hispanic males Wright had met at the show. JA 181-189. Wright, Roderick and the Hispanic males were present when the paperwork was filled out. JA 184-85. Petitioner also testified that the failed purchase was attempted at the demand of Wright. She testified that she kept trying to complete the sale because Wright threatened her. JA 189. Petitioner admitted to the jury that she made misstatements on the forms, but believed that she did not have a choice because she was afraid for herself and her kids. JA 184-86.

On cross-examination, petitioner acknowledged that she had not attempted to report the abuse to her pastor, to police, to security guards at the gun shows or to her children's teachers. Petitioner admitted that she put her girls at risk by not telling anyone about the abuse but contended that, at the time, she thought that she was protecting her girls by not revealing the abuse. JA 232-38.

The defense then called ATF Agent Kelly Oates. SF 723. The defense sought to elicit statements made to Agent Oates by Wright and Sanders, in which they admitted that the guns were purchased for them because their status as felons prevented their own purchases. The defense contended that these statements constituted admissions against interest pursuant to Fed. R. Evid. 804(b)(3) and 807. The District Court sustained the prosecution's hearsay objections on the ground that Rule 804 applied only to parties and, because Wright and Sanders were not reliable people, the statements were not trustworthy and not exculpatory to the petitioner. SF 725, 739.

The defense attempted to call Dr. Myers as a final witness. The District Court sustained the prosecution's relevance objection. The defense then rested its case under protest and both parties closed. JA 287; SF 729. After resting before the jury, the defense made proffers regarding the excluded testimony of Agent Oates, SF 731-40, and Dr. Myers, JA 273-87.

As part of petitioner's proffer, Dr. Myers' testimony was heard outside the presence of the jury. Dr. Myers testified that domestic violence is a pattern of coercive control by one party, generally a male, over another party, generally a female, where there are tactics of power and control used along with violence and sexual abuse. JA 276. She testified that the eight factors that make up a power and control relationship are: intimidation; emotional abuse; isolation; minimizing; denying and blaming; using children; male privilege; and coercion and threats. JA 277 ; Def.'s Mot. For New Trial, Tr., Doc. 107. Dr. Myers testified that, in addition to physical harm, battering damages the victim's self-esteem, causes emotional and psychological harm and causes the victim to become isolated, withdrawn or dependent. Battery also results in the victim becoming subservient to the batterer and changing her behavior so as not to anger the abuser. The abuse affects the perceptions and judgment of the victim and

may also cause the victim to engage in criminal behavior. JA 277-78.

Dr. Myers also testified that a woman stays in a battering relationship for dependency reasons, out of fear and terror and because she cannot formulate a plan about how she is going to succeed without the batterer. JA 279. Often she wants the violence to stop but the relationship to continue. *Id.*. Dr. Myers testified that it is common for the victim in a battering relationship not to seek help from the police, authorities or other persons as a result of shame, economic dependency and perceived danger. Dr. Myers testified that a common strategy to avoid being battered is compliance with the wishes of the batterer. JA 279-80. Dr. Myers testified that petitioner was a battered woman, who had been the victim of domestic violence at the hands of Ted Dixon and Wright. JA 280-81. Dr. Myers testified that the relationship the petitioner had with Ted Dixon was a power and control relationship that continued even after their divorce, and that petitioner had a similarly destructive power and control relationship with Wright. JA 281-82.

Dr. Myers analyzed the Petitioner's relationship with Wright and the events of that relationship, particularly leading up to the purchase of the firearms. Dr. Myers testified that the increase in the severity of the violence, the introduction of guns into the relationship and Wright's threats to petitioner's daughters escalated the power and control that Wright exercised over petitioner and thus adversely affected petitioner's judgment as to whether to buy guns. JA 282-83. Dr. Myers testified that petitioner's fears were well-grounded given her experiences with Wright. Dr. Myers testified that it was consistent with a power and control relationship for the batterer to have little or no regard for the well-being of the victim and therefore put the victim at risk by requiring her to do something illegal. JA 284. Dr. Myers testified that petitioner had not recklessly or negligently placed herself in the relationship with Wright and that her conduct was a

means of avoiding the harm that Wright threatened. JA 284. Dr. Myers' assessment was that petitioner had not called the police because she feared retaliation; did not talk to her family because she did not want to put them at risk; and that she had purchased the guns in order to buy time and to avoid an immediate risk of harm to herself and her children. Dr. Myers offered her opinion that petitioner bought the guns because petitioner did not perceive that she had any other choice. JA 284-87.

While the District Court excluded Dr. Myers' testimony, it consented to give the Fifth Circuit Pattern Instruction on duress.[5] The defense objected to the instruction and requested that the jury be charged that she had the burden of producing evidence to support each element of the duress defense, and that if she had produced such evidence, then the prosecution had to prove beyond a reasonable doubt the absence of duress or coercion. JA 47, 300. The District Court overruled the defense's objection to the pattern charge and refused the defense's proffered instruction. The charge to the jury thus placed both the burden of production and the burden of persuasion on the Petitioner to prove each element of her duress defense. JA 312-13. Petitioner was found guilty by the jury on all nine counts. JA 316-17.

C. Court Of Appeals Proceedings

Petitioner's principal arguments on appeal concerned the District Court's exclusion of the testimony of Dr. Myers and Agent Oates, as well as the improper shifting of the burden of proof on the duress defense. Describing the case as "unremarkable" save for the fact that petitioner had raised "battered woman's syndrome" as part of her duress defense, the Fifth Circuit affirmed. JA 325-26.

The bulk of the Fifth Circuit's opinion addresses the exclusion of Dr. Myers' testimony and holds that the District

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[5] JA 286-87, 290-91.

Court had not abused its discretion on three grounds.[6] First, despite Dr. Myers' explications of the nature and effect of battering upon the perceptions, judgment and behavior of the victim generally, the Fifth Circuit concluded that the proffered testimony was "inherently subjective" because the testimony "clearly focused on Dr. Myers's opinions as to [petitioner's] individual state of mind. JA 328-29. In this regard the Fifth Circuit's attack on the supposed "subjectivity" of such testimony conflicts with contrary decisions by the Tenth Circuit,[7] Federal District Courts,[8] state courts[9] and a Joint report by the Department of Justice and the United States Department of Health and Human Services published in May 1996.[10]

Second, the Fifth Circuit declared that Dr. Myers's opinions were "conclusory" given that her proffered testimony addressed the reasonableness of petitioner's actions in light of her mental state. JA 329. Such a contention, even if it were accurate, plainly could have been addressed by appropriate

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[6] While the Question Presented does not include the Fifth Circuit's error in excluding Dr. Myers' testimony, that error compounded the Fifth Circuit's burden-shifting error. The erroneous exclusion of Dr. Myers' testimony made it even more likely the Petitioner could not carry an affirmative burden. This additional error is therefore relevant to any harmless error analysis the Court undertakes.

[7] *Dunn* v. *Roberts*, 963 F.2d 308 (10th Cir. 1992). The Eighth Circuit has also affirmed the prosecution's use of such evidence to counter an abuse victim's recantation of her testimony against an abusive defendant. *Arcoren* v. *United States*, 929 F.2d 1235, 1240 (8th Cir. 1991).

[8] *United States* v. *Marenghi*, 893 F. Supp. 85 (D. Me. 1995).

[9] *People v. Romero*, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), *rev'd on other grounds*, 883 P.2d 388 (1994)

[10] *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (May 1996), *available at* http://www.ncjrs.org/pdffiles/batter/pdf and at the United States Department of Justice website, www.usdoj.gov).

limitations by the District Court upon Dr. Myers's testimony. Third, the Fifth Circuit found no abuse of discretion because Dr. Myers was "not a competent witness to testify as to the facts of [petitioner's] relationship with Wright based upon what others told her." JA 331. This contention defies both Fed. R. Evid. 703 ("the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted") and the record in that Dr. Myers had interviewed petitioner.[11]

With respect to the burden-shifting argument, petitioner acknowledged that the law in the Fifth Circuit, and in a minority of other circuits, requires the proponent of the duress defense to bear the burden of production and persuasion, by a preponderance of the evidence. Petitioner pointed out that the rule in the majority of circuits is to place the burden of production on the defendant, and then, once the defendant meets that burden, to leave the burden of persuasion on the prosecution to prove that duress evidence does not create reasonable doubt. Petitioner contended that the majority rule is the better rule, pointing out the prosecution's ample opportunity to contest the facts and circumstances that she claimed were the source of the duress. Petitioner asked the Fifth Circuit to reconsider its rule based, in part, on her argument that the duress defense negated the *mens rea* element of the charge, and thus the prosecution has the constitutional burden of disproving duress beyond a reasonable doubt, citing *In re Winship*, 397 U.S. 358, 364

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[11] The Fifth Circuit's reasoning on this point is entirely circular in that it responds to petitioner's reliance upon Fed. R. Evid. 703 by observing that Dr. Myers's testimony was not admissible in any event: "Where, as here, an expert's testimony is inadmissible, the hearsay upon which that opinion is based is also inadmissible." JA 330. Yet the opinion plainly indicates in its language and structure that the supposed "incompetency" of Dr. Myers was a separate ground for affirming the rejection of her testimony.

(1970). The court of appeals simply affirmed based upon its prior holdings and without further analysis. JA 332.[12]

After the panel affirmed, petitioner timely sought Rehearing En Banc. In seeking rehearing, petitioner pointed out the substantial split of authority among the circuits, that the Fifth Circuit was in the minority and asked the en banc Fifth Circuit to reconsider its burden-shifting rule in duress cases.

SUMMARY OF ARGUMENT

The Fifth Circuit's rule is contrary to modern common law respecting the allocation of burdens of proof in criminal cases involving so-called "affirmative defenses" such as duress. Recognized by a significant majority of federal circuit courts of appeals as well as a significant majority of both state courts and state statutes, common law dictates that once a defendant adduces sufficient evidence in support of a defense of duress or coercion, the prosecution retains the burden of disproving duress beyond a reasonable doubt. The Fifth Circuit's rule is anachronistic in that it comports with early common law traditions that treated criminal trials in the same fashion as civil disputes.

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[12] The Fifth Circuit's burden-shifting rule for duress defenses has a sparse pedigree. The earlier *Willis* opinion cited by the court of appeals in the present case offers only that "[s]ince a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant. *Gant* v. *United States*, 691 F.2d 1159, 1165 (5th Cir. 1982). To succeed, the defendant must prove every element of the defense by a preponderance of the evidence." *United States* v. *Willis*, 38 F.3d 170, 179 (5th Cir. 1994). The cited *Gant* opinion (691 F.2d at 1165), offers no support as it does not render a holding, or even discuss, the burden of persuasion. Instead, it appears that the Fifth Circuit's rule turns entirely upon a Ninth Circuit decision, *United States* v. *Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991), which it cited in a footnote to its *Willis* decision. The flaws in the *Dominguez-Mestas* opinion are discussed *supra*. Prior to *Willis*, there appears to be no other Fifth Circuit case that discusses the burden of persuasion on a duress defense.

The more recent common law holds that allocating burdens of proof in criminal trials in the same fashion as civil ones necessarily conflicts with the fundamental tenets of criminal law, including the presumption of innocence and the concordant burden of the prosecution to prove guilt beyond a reasonable doubt. This Court's opinions regarding the nature of *mens rea* also support the common law rule in that those decisions demonstrate that duress and coercion defenses necessarily address the *mens rea* component of crime. Practical considerations, including risk of juror confusion engendered by conflicting instructions, also support the majority rule.

The scant reasoning in support of the Fifth Circuit rule amounts to a claim that duress defenses can be difficult for the prosecution to disprove. The Court has rejected that claim. Moreover, it is inconsistent with the nature of the defense, which necessarily involves other individuals who are responsible for creating observable, coercive circumstances. And it is further belied by the power of trial courts to reject evidence that is not probative or reliable and to refuse an instruction on duress where the evidence of duress is insufficient to warrant one.

The error in this case was constitutional in dimension. The Court's interpretations of the requirements of the Due Process Clause in the context of the allocation of burdens state plainly that where a defense addresses an element of the crime charged, criminal courts may not instruct a jury that the defendant bears any substantive burden of proof. The Court has consistently held over the last half-century that the *mens rea* component of criminal charges encompasses the fundamental principle that the accused was free to choose a course of action other than unlawful conduct. Duress or coercion defenses, by their very terms, strike at the roots of *mens rea*. As such, the requirements of the Due Process Clause preclude shifting the substantive burden to the defense in a duress case.

The error in this case was structural and requires automatic reversal. Allocations of burden of proof affect the substantial rights of a criminal defendant in that they fundamentally affect the manner in which the fact finder assesses and weighs evidence. Thus, the error affects the framework within which the trial proceeds. Further, the prosecution is unable to show that the error at issue was harmless. Here, petitioner's duress defense was her sole defense at trial. The trial court deemed her duress evidence sufficient to warrant an instruction on the defense as a threshold matter. The evidence that petitioner adduced at trial was corroborated in certain important respects by the prosecution's own case. Taken as a whole, the evidence of duress was sufficient to create a reasonable doubt. Petitioner proffered additional evidence to bolster her defense, including the testimony of an expert on domestic violence, that the trial court erroneously excluded. The record therefore reflects that imposing upon petitioner the burden of proving her defense by a preponderance of the evidence had a substantial effect on the outcome of her trial.

ARGUMENT

I. COMMON LAW IN FEDERAL AND STATE COURTS, AS WELL AS THE MAJORITY OF STATE STATUTES SUPPORTS REJECTION OF THE FIFTH CIRCUIT'S BURDEN-SHIFTING RULE.

Congress has not passed a statute codifying the defense of duress.[13] Instead, the law regarding this defense has developed as federal common law. *United States* v. *Dodd*, 225 F.3d 340, 345 (3d Cir. 2000). This Court has recognized

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[13] The terms duress and coercion refer to the same defense, mean the same thing and are used interchangeably. *See Fifth Circuit Pattern Jury Instructions, Criminal*, § 1.36 (2001); *Sixth Circuit Pattern Jury Instructions*, § 6.05 (1991); *United States* v. *Dodd*, 225 F.3d 340, 349 n.6 (3d Cir. 2000); *United States* v. *Toney*, 27 F.3d 1245, 1248 (7th Cir. 1994).

the concept of duress and its applicability to federal criminal statutes. *United States* v. *Bailey*, 444 U.S. 394, 409-10 (1980). While the Court has not expressly addressed how the burdens of production and persuasion should be allocated, a substantial majority of courts, as well as state statutes, reject shifting any of the burden of persuasion to the defense to prove duress. *Dodd*, 225 F.3d at 348-49.

A. Duress At Common Law.

At common law, duress was available where the individual asserting the defense had acted under "an unlawful threat of imminent death or serious bodily injury." *Bailey*, 444 U.S. at 409. Blackstone described duress as "threats and menaces which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal." W. Blackstone, 4 *Commentaries* *30. Blackstone further explained that, duress is "a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject." *Id.* Thus, "it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion." *Id.* Blackstone's explanation of duress closely models the rationale for what are sometimes called excuse defenses – that the actor is not "sufficiently able to control his conduct so as to be held accountable for it." 2 Paul Robinson, *Criminal Law Defenses* 348 (1984). Where duress is present, punishment serves neither the deterrent nor the condemnatory purposes of criminal justice because a person of reasonable firmness in the same situation would also succumb to the coercion. *Id.* at 349.

Early common law courts allocated the burden of proof in criminal cases in the same manner as they did in private disputes. George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 910 (1968). Procedural

rules governing criminal liability were therefore indistinguishable from the rules governing private disputes. *Id.* at 894. Early common law courts strictly adhered to the Roman maxim that "the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule." *Id.* at 898. Thus, even though early common law courts recognized the presumption of innocence and required the prosecution to prove its case beyond a reasonable doubt, criminal defendants bore the burden of persuasion on all defenses, including duress. *Id.* at 894.[14]

Although widely accepted until the end of the Nineteenth Century, the early common law rule was the product of flawed reasoning as it was based on the authority of one case, *The King* v. *Oneby*, 92 Eng. Rep. 465 (K.B. 1727). Blackstone interpreted *Oneby* to stand for the general principle that a criminal defendant should bear the duty of persuasion on all issues that appeared to be defensive. Fletcher, *supra* at 902-03. *Oneby's Case*, however, was not a criminal jury trial where there was a general verdict. Instead, it came before the judges of the King's Bench pursuant to special verdict proceeding, whereby the judges made a decision based upon facts that had already been determined. *Id.* at 902.[15]

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[14] The leading early authorities on the common law both reflected this rule. In *Crown Law*, Foster explained that the prisoner had to "satisfactorily" prove circumstances of "accident, necessity and infirmity." M. Foster, *Crown Law* 255 (1762). Blackstone similarly stated that the defense's case included "circumstances of justification, excuse and alleviation." 4 Blackstone, *supra* at 201. Neither Foster nor Blackstone distinguished between the burdens of production and persuasion. This continued to be the rule when the Fifth Amendment was adopted and it was the American rule when the Fourteenth Amendment was ratified. *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977).

[15] Fletcher, *supra* at 902. Oneby had killed a man in a fight over a game of cards. *Id.* The facts contained in the verdict did not indicate whether Oneby had killed maliciously. The judges found Oneby guilty of

Blackstone's rule won wide acceptance in a different procedural context from its source, litigation of private disputes. The process of finding guilt or non-guilt in a criminal trial, however, is very different than merely finding facts in a special verdict case from which the judge would determine guilt or innocence. In a case on a general verdict, the process of fact-finding and of determining guilt beyond a reasonable doubt are inseparable. *Id.* at 906.

Toward the end of the Nineteenth Century, courts in common law jurisdictions began to apply anew the long-held traditional view that there must be moral content to criminal guilt. [16] Criminal guilt was equated with blameworthiness. Instead of seeing defensive claims as issues to be separately

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murder and explained that "'[i]f A kills B and no sudden quarrel appears, it is murder" adding that "it lies on the party indicated to prove the sudden quarrel.'" *Id.* (alteration in original) (quoting *Oneby*, 92 Eng. Rep. at 473). Foster and Blackstone interpreted *Oneby* to support the general principle "that a criminal defendant should bear the burden of persuasion on all issues that appear to be 'defensive.'" *Id.* at 902-03. English Courts applied the rule announced by Foster and Blackstone to cases involving self-defense and insanity for many years but reconsidered the rule in 1935 in *Woolmington* v. *Director of Public Prosecutions*, [1935] A/C/ 462. *Id.* at 903 and nn.74-75. In *Woolmington*, the English Court rejected the applicability of Blackstone's rule to the defense of accident in a homicide case. English Courts later expanded the *Woolmington* rule to include provocation and self-defense. However, Foster and Blackstone's interpretation of *Oneby* was criticized much earlier in a dissent to the landmark decision *Commonwealth* v. *York*, 50 Mass. 93 (1845). The dissent explained that the *Oneby* rule was dicta and noted that Blackstone had relied entirely on Foster. *Id.* at 132-33 (Wilde, J. dissenting). Later treatises simply cited either Blackstone or Foster in support of the rule. *Id.* at 133. Justice Wilde considered that the rule placing the burden of persuasion on the criminal defendant had little basis in law or fact and thus was misapplied. *Id.* at 134.

[16] *See Trumble* v. *Territory*, 21 P. 1081 (Wyo. 1889); *State* v. *McCluer*, 5 Nev. 132 (1869); *Territory* v. *Lucero*, 46 P. 18 (N.M. 1896); *State* v. *Porter*, 34 Iowa 131 (1871); *State* v. *Hill*, 69 Mo. 451 (1879); *People* v. *Marshall*, 44 P. 718 (Cal. 1896); *People* v. *Coughlin*, 32 N.W. 905 (Mich. 1887); Fletcher, *supra* at 912.

determined, exculpatory issues became "threads in the fabric of guilt," no different than inculpatory matters such as the proof of the act or conduct. Fletcher, *supra* at 912. In viewing inculpatory and exculpatory issues as part of the whole, common law courts held that it no longer made sense to divide the burden of persuasion among the issues. Proceeding from the premise that the prosecution had to prove the defendant's guilt, courts in the United States moved to the position that the prosecution had to disprove properly raised claims of self-defense and insanity. The most notable, and influential decision holding that the prosecution bears the burden to disprove a properly raised defense beyond a reasonable doubt, was this Court's decision in *Davis* v. *United States*, 160 U.S. 469 (1895).

B. The Evolution Of The Common Law With Respect To Affirmative Defenses In United States Courts.

In *Davis*, the issue was whether a defendant asserting a defense of insanity had the burden of persuasion on that issue or whether, once the issue was raised, the prosecution had to disprove the defense. Following an examination of the history of the insanity defense and the leading decisions of the time, the Court concluded that once the accused had produced evidence of insanity, the prosecution must then prove that the defense did not create a reasonable doubt, given that the defense addressed the *mens rea* element of the crime charged. *Id.* at 485 ("One who takes human life cannot be said to be actuated by malice aforethought . . . unless at the time he had sufficient mind"). In reaching its decision, the Court relied on the most fundamental concept of criminal law, "that 'to make a complete crime cognizable by human laws, there must be both a will and an act'...So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act, consequent upon such vicious will.'" *Id.* at 484 (quoting W. Blackstone, 4 *Commentaries* *21).

The Court observed that a criminal proceeding is fundamentally different than a civil one in that a not guilty plea "controverts the existence of every fact essential to constitute the crime charged." *Id.* at 485. Moreover, because the presumption of innocence is "an instrument of proof . . . whereby [the accused's] innocence is established . . . the burden of proof, as those words are understood in the criminal law, is never upon the accused to establish his innocence." *Id.* at 487. Guilt therefore cannot be "regarded as proved if the jury entertain a reasonable doubt from *all the evidence* whether he was legally capable of committing a crime." *Id.* at 486 (emphasis added).

Thus, the *Davis* Court rejected the common law method of equating civil and criminal matters for purposes of the burden of proof. It employed and reaffirmed the requirement that the prosecution bears the sole burden to persuade fact finders that there was both an "evil mind" and an "evil act" before one can be found guilty of a crime. The Court emphasized that the prosecution's irreducible burden was to demonstrate that none of the evidence admitted in the case rose to the level of a reasonable doubt. If "the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged." *Id.* at 488.

While the Court has not construed *Davis* as a constitutional ruling,[17] it had a seminal impact on the federal common law. Accordingly, subsequent courts applied the holdings in *Davis*

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[17] Subsequent decisions have treated *Davis* as a case involving this Court's supervisory power. *See Leland* v. *Oregon*, 343 U.S. 790, 797 (1952) ("The [*Davis*] decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts."); *see also Mullaney* v. *Wilbur*, 421 U.S. 684, 696 (1975) (*Davis* "decid[ed] a question of federal criminal procedure"); *Patterson*, 432 U.S. at 203 ("*Davis* was not a constitutional ruling").

to defenses other than insanity, including self-defense,[18] lack of knowledge,[19] and entrapment,[20] as well as duress.[21] While

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[18] *De Groot* v. *United States*, 78 F.2d 244 (9th Cir. 1935) (a defendant has the initial burden of producing evidence of self-defense and then the government has the burden of persuasion to show beyond a reasonable doubt that the defendant did not act in self-defense); *Meadows* v. *United States*, 82 F.2d 881, 884 (D.C. Cir. 1936) (approving jury instruction that no burden is placed upon the defendant to prove self-defense); *Kelly* v. *United States*, 361 F.2d 61, 62 (D.C. Cir. 1966) (defendant has the burden of production of evidence to raise self-defense, and then the government must disprove self-defense beyond a reasonable doubt); *Bynum* v. *United States*, 408 F.2d 1207 (D.C. Cir. 1968) (same); *United States* v. *Alvarez*, 755 F.2d 830, 842 (11th Cir. 1985) (it has become "a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government") (citing *United States* v. *Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir. 1978), *United States* v. *Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977), *Frank* v. *United States*, 42 F.2d 623, 629 (9th Cir. 1930), and *Davis*, 160 U.S. at 488). *See also*, *United States* v. *Deon*, 656 F.2d 354, 355 (8th Cir. 1981) (acknowledging that the prosecution has the burden of disproving self-defense beyond a reasonable doubt, once the defense has been raised). For decades, this has also been the rule on self-defense in the Fifth Circuit. *United States* v. *Johnson*, 542 F.2d 230, 233 n.4 (5th Cir. 1976).

[19] *Cf. Bryson* v. *United States*, 396 U.S. 64, 69 (1969) (conviction for making a false statement under 18 U.S.C. § 1001 negates any claim that the defendant "did not know the falsity of his statement at the time it was made, or that it was the product of an accident, honest inadvertence, or duress"); *United States* v. *Steinhilber*, 484 F.2d 386, 390 (8th Cir. 1973) (relying upon *Bryson* in holding that prosecution has the burden of negating the defendant's claim that he did know the nature of the falsity of his statement, or that it was the product of an accident, honest inadvertence or duress).

[20] When a defendant has produced evidence that he has been entrapped, the prosecution must prove beyond a reasonable doubt that the accused was predisposed to commit the offense independent of the government's acts. *Jacobson* v. *United States*, 503 U.S. 540, 554 (1992). This was the prevailing view before *Jacobson* was decided. *United States* v. *Humphrey*, 670 F.2d 153, 155-56 (11th Cir. 1982); *United States* v. *Dean*,

the ultimate holding of *Davis* has been superseded by an act of Congress placing the burden of proof on the defendant to prove insanity by clear and convincing evidence,[22] this Court's adherence to the fundamental principles announced in *Davis* has not changed – nor should it.

The *Davis* Court's construction of the *mens rea* element of crime has been reaffirmed and expanded by subsequent decisions. In *Morissette*, this court explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as a child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrenee and reformation in the place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette v. *United States*, 342 U.S. 246, 250-51 (1952). This court has continued to recognize the requirement of a "vicious will" as a fundamental underpinning of our criminal justice system. "Criminal liability is normally based upon the

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666 F.2d 174, 180 (5th Cir. 1982); *United States* v. *Hermosillo-Nanez*, 545 F.2d 1230, 1232 (9th Cir. 1976).

[21] See Argument II, *infra*.

[22] The Insanity Defense Reform Act of 1984 changed the common law rule established in *Davis*. It provides that "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." 18 U.S.C. § 17(b).

concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand'" *Bailey*, 444 U.S. at 402 (quoting *Morissette*, 342 U.S. at 251). This Court has continued to recognize that in determining whether there should be criminal liability, a court "must examine both the mental element, or *mens rea*, required for conviction ... and the circumstances under which the 'evil-doing hand' can avoid liability under that [statute] because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Id.*

C. The Majority Of State And Federal Courts Now Place The Burden Of Persuasion On The Prosecution.

Courts often refer to duress as an "affirmative defense,"[23] although such categorization means little. Affirmative defenses are divided into three types. See *United States* v. *Hartsock*, 347 F.3d 1 (1st Cir. 2003). The first type encompasses defenses that negate guilt by refuting a required element of the offense. The second category includes defenses that do not negate an element of the crime, but provide a justification sufficient to overcome or mitigate criminal culpability. The third category contains defenses based on individual exceptions to substantive crimes.[24] However, identification of a defense as one of these types does not control the allocation of the burden of persuasion. "The term 'affirmative defense' sometimes is used to indicate that the defendant bears the burden of production and sometimes to indicate that the defendant bears both the

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[23] *Bailey*, 444 U.S. at 413; *United States* v. *Falcon*, 766 F.2d 1469, 1477 (10th Cir. 1985); *United States* v. *Deleveaux*, 205 F.3d 1292, 1298-99 (11th Cir. 2000); *Willis*, 38 F.3d at 179; Model Penal Code § 2.09 (Final Draft 1962); 1 LaFave, *Substantive Criminal Law* § 1.8(c) (2d ed. 2003).

[24] This third type is generally an exception or proviso in a statute setting forth the defense. *Hartsock*, 347 F.3d at 8; 1 LaFave, *supra*, § 1.8(c).

burden of production and the burden of persuasion." 1 Robinson, *supra*, § 3(c), at 16.[25]

1. The Majority Rule In The Federal Courts Is To Place The Burden Of Persuasion On The Prosecution.

The majority of Circuits that have addressed the issue have placed the burden of production for the duress defense on the defendant, but leave in place the prosecution's burden of persuasion. As demonstrated in the opinions of the Circuits that so hold, the reasons for placing the burden on the prosecution are substantial.

As reflected in the Model Penal Code, initially published in 1962,[26] it was well established in federal law that the

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[25] The Fifth Circuit has used broad language in stating that the assertion of an affirmative defense means that the defendant has both the burden of production and the burden of persuasion, *Willis*, 38 F.3d at 179, although that is not true of self-defense in the Fifth Circuit. *E.g.*, *Johnson*, 542 F.2d at 233 n.4. Other circuits acknowledge that the label of affirmative defense has little to do with who has the burden of persuasion and that the burden of proof for an affirmative defense is generally determined on a case by case basis. *See United States* v. *Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996); *Alvarez*, 755 F.2d at 842 n.12 (explaining that for affirmative defenses, the burden of persuasion may fall either on the government or the defendant, as determined by statute or by case decision). This approach has been criticized because of a lack of a consensus on criteria for allocating the burden. 1 LaFave, *supra*, § 1.8(c); 1 Robinson, *supra* § 5(b)(2).

[26] The Model Penal Code (Final Draft 1962) provides that "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." *Id.* § 2.09(1). The defense is unavailable if the actor negligently places himself in a situation in which it was probable he would be subject to duress. *Id.* § 2.09(2). Recognition of the defense of duress reflects the long tradition of penal laws that a person will not be held criminally responsible for his conduct when he is overwhelmed by such force that his behavior is considered involuntary. *Id.* § 2.09, comt. 2. In such instance

prosecution had the burden of disproving a defense that involved a defendant's blameworthiness. As the Eighth Circuit explained, "[i]t is the law, and no one contends otherwise, that the burden of proof rests upon the Government to prove the defendant's guilt beyond a reasonable doubt and there is no burden upon the defendant to prove his defense of coercion." *Johnson* v. *United States*, 291 F.2d 150, 155 (8th Cir. 1961). Fourteen years later when the Ninth Circuit addressed the issue in *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), there similarly seemed to be no question that once the defendant offered evidence to support a defense of duress, the prosecution had to disprove duress beyond a reasonable doubt. *Id.* at 1336 & n.2. The court in *Hearst* adopted the reasoning of *Davis*, without citation, in holding

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the actor's conduct is considered to be justified or excused. *Id.* § 1.12, cmt. 3. The Model Penal Code provides a broader defense than 5th Circuit law, which only allows the defense when there is a threat of serious bodily injury or death. *Fifth Circuit Pattern Jury Instructions, Criminal* § 1.36 (2001).

Section 1.12 sets forth the general requirement that the prosecution must prove each element of an offense beyond a reasonable doubt in order to warrant a conviction. The term "element of an offense" is broadly defined to include negating an excuse or justification for such conduct. Model Penal Code § 1.13(9); § 1.12, cmt. 2. However, the requirement of negating an affirmative defense arises only after there is evidence produced, by the defense or prosecution, sufficient to raise a reasonable doubt on the issue. Thereafter, the prosecution must disprove the defense beyond a reasonable doubt. *Id.* § 1.12, cmt. 3. These provisions result from a belief that a determination of guilt requires proof beyond a reasonable doubt of the prohibited act as well as the requisite criminal intent, or *mens rea*. *Id.* § 1.12, cmt. 5.

that the prosecution bears the burden to disprove coercion.[27] *Hearst*, 563 F.2d at 1336.[28]

Both the Eighth[29] and Sixth[30] Circuits followed the Ninth Circuit's decision in *Hearst* when they decided the same question. The Second Circuit addressed the issue in response to a claim that the Due Process Clause requires the prosecution to disprove duress beyond a reasonable doubt. Although discussing constitutional considerations, the Second Circuit did not rely on the Due Process Clause in deciding the issue. Instead, the court explained that:

> Several considerations lead us to conclude that in federal criminal trials, the [prosecution's] burden of disproving

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[27] In so holding, the Ninth Circuit relied on its own insanity defense cases, *Hartford* v. *United States*, 362 F.2d 63, 64 (9th Cir. 1966) (citing *Buatte* v. *United States*, 330 F.2d 342, 345 (9th Cir. 1964)), which in turn relied on this Court's opinion in *Davis*.

[28] The Ninth Circuit reaffirmed the holding in *Hearst* in subsequent cases: *United States* v. *Gonsalves*, 675 F.2d 1050 (9th Cir. 1982), which held that after a defendant shifts the burden to the prosecution by raising an affirmative defense, the government is required to disprove every element of the affirmative defense beyond a reasonable doubt. In *United States* v. *Guess*, 629 F.2d 573, 577 (9th Cir. 1980), the court cited *Davis* and *Hearst* in support of its holding that once a criminal defendant satisfies his burden of producing evidence to support an affirmative defense, the prosecution must then disprove the defense beyond a reasonable doubt.

[29] *United States* v. *Campbell*, 609 F.2d 922, 925 (8th Cir. 1979). *See also Model Criminal Jury Instructions for the Eighth Circuit* § 9.02 (rev. ed. Sept. 1986) (the negative of any submissible defense should be added as an element of the offense); *United States* v. *Norton*, 846 F.2d 521, 524-25 (8th Cir. 1988) ("when the coercion defense is an issue, a final element regarding that matter, phrased in the negative, should be added to the general elements instruction" (internal quotation omitted)).

[30] *United States* v. *Campbell*, 675 F.2d 815, 821 (6th Cir. 1982). *See also Pattern Criminal Jury Instructions* § 6.05 (1991) (Coercion or Duress) (the instruction on coercion or duress provides that the prosecution has the burden of proving that the defendant was not coerced).

> at least one element of duress should be prove[d] beyond a reasonable doubt. There is a grave possibility of juror confusion if a jury is instructed, on the one hand, that the prosecution must prove all elements of the crime, including willfulness, beyond a reasonable doubt, and, on the other hand, that the prosecution need only to disprove duress by a preponderance of the evidence. Such instructions can create an unacceptable risk that the jury will accept a preponderance of the evidence as sufficient to satisfy the prosecution's burden of proving willfulness beyond a reasonable doubt. Moreover, a reasonable doubt standard for duress will lessen the risk that a jury will convict solely because of failure of a defense, a consideration we have previously stressed in formulating federal rules of practice for jury instructions....We are not persuaded that juror confusion may be avoided simply by adding an admonition that, regardless of whether the jury disbelieves the duress evidence, the burden remains on the government to establish every element of the crime beyond a reasonable doubt.

United States v. *Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983).[31] The Tenth[32] and First[33] Circuits reached the same conclusion.

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[31] The Second Circuit added that it saw no reason peculiar to the duress defense that would warrant departure from the general federal practice. *See Mitchell*, 725 F.2d at 836 (citing the Eighth Circuit's *Campbell* opinion, 609 F.2d at 925, *Hearst*, 563 F.2d at 1336 n.2, Model Penal Code §§ 1.13, 2.09, and 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 14.16 (3d ed. 1977)). The Second Circuit's holding in *Mitchell* has been reaffirmed in *United States* v. *Smith*, 160 F.3d 117, 123 (2d Cir. 1998) (citing 1 LaFave & Scott, *Substantive Criminal Law* § 1.8, at 75 (1986)).

[32] "Coercion is an affirmative defense which the government must disprove beyond a reasonable doubt only after the issue has been raised." *Falcon*, 766 F.2d at 1477 (citing *Bailey*, 444 U.S. at 412-13, *United States* v. *Corrigan*, 548 F.2d 879, 881-82 (10th Cir. 1977), and *United States* v. *Jackson*, 569 F.2d 1003, 1009 & n.14 (7th Cir. 1978)). The latter two are

Even prior to the Seventh Circuit's first opportunity to address the issue, the *Federal Criminal Jury Instructions of the Seventh Circuit* placed the burden on the prosecution to prove beyond a reasonable doubt the absence of coercion.[34] Of particular note is the Seventh Circuit's second opinion on the burden of persuasion, *United States* v. *Talbott*, 78 F.3d 1183 (7th Cir. 1996), where the defendant was charged with

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self-defense cases which hold that once the defendant raises the issue of self-defense, the prosecution must disprove that defense beyond a reasonable doubt. This holding was reaffirmed by the Tenth Circuit in *United States* v. *Scott*, 901 F.2d 871, 873 (10th Cir. 1990).

[33] In *United States* v. *Amparo*, 961 F.2d 288, 291 (1st Cir. 1992), the court held that once a defendant has satisfied an "entry level burden" to support a finding of duress, "and the crime charged requires *mens rea*, the government must prove beyond a reasonable doubt that the defendant's criminal acts were not in fact the product of duress." The First Circuit has not wavered from its decision in *Amparo*. In *United States* v. *Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996), the court held that in a case charging possession of a controlled substance with the intent to distribute, a defendant must produce sufficient evidence that "fairly supports" each element of his duress defense, and that a district court is not to weigh the evidence, make credibility determinations or resolve any conflicts of proof in determining whether the accused has borne the burden of production. Thereafter, the prosecution is required to show beyond a reasonable doubt that the defendant's acts were not the product of duress. *Id. See also First Circuit Pattern Criminal Jury Instructions* §§ 5.04, 5.05 (1998) (the prosecution has the burden of disproving the defenses of self-defense and duress once they have been properly raised).

[34] The pattern instructions provide that the jury should be instructed on the issue by adding coercion-negation as an element that must be proved beyond a reasonable doubt, citing *Johnson* v. *United States*, 291 F.2d 150 (8th Cir. 1961). *Federal Criminal Jury Instructions of the Seventh Circuit* § 4.05, cmt. (1980). In *United States* v. *Toney*, 27 F.3d at 1248, the court held that once a defendant meets the initial burden of producing some evidence of each element of the defense of coercion, "he is entitled not only to an instruction on coercion, but also a so-called 'coercion-negation' instruction." The court reasoned that once the defendant sufficiently raises the issue of coercion, he is "*presumed* coerced, therefore presumed innocent, unless the government disproves coercion beyond a reasonable doubt." *Id.*

being a felon in possession of a firearm and in possession of ammunition in violation of 18 U.S.C. § 922(g)(1), to which he raised a self-defense and a "good faith" defense. The trial judge found that both defenses were sufficiently raised, but instructed the jury that the defendant bore the burden of proving the defense by a preponderance of the evidence. On appeal, the Seventh Circuit recognized that this Court's Due Process Clause jurisprudence allows a legislature to place the burden on the defendant to prove an affirmative defense, citing *Patterson* v. *New York*, 432 U.S. 197 (1977) and *Martin* v. *Ohio*, 480 U.S. 228 (1987). The Seventh Circuit rendered a decision based on federal common law. The court expressly stated that its analysis also applied to the defenses of duress, coercion, necessity or self-defense. *Talbott*, 78 F.3d at 1187 n.2.[35]

As demonstrated by the Circuit Court decisions above, there is ample justification for requiring the prosecution to disprove duress beyond a reasonable doubt once the defendant has put forth evidence in support of the defense. The most fundamental reason is that our criminal courts do not permit the prosecution to take the liberty of a citizen unless that citizen is morally blameworthy for her actions. In recognizing the defense of duress, our society has accepted that a person does not act with the requisite "evil mind" if he or she acts under the sway of the will of another.[36] Accordingly, a duress defense controverts the essential *mens rea* component of the prosecution's burden and the

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[35] In further support of its ruling, the court cited the Federal Judicial Center's federal pattern instruction that places the burden on the government to disprove duress beyond a reasonable doubt. *Talbott*, 78 F.3d at 1187; *Pattern Criminal Jury Instructions*, Instruction 56 (1987).

[36] "Society has always recognized that even individuals who would otherwise obey the law can be forced to commit an offense if threatened with a sufficiently grave harm." 2 Robinson, *supra* § 177(a), at 349. Accordingly, we say his or her conduct is excused or justified. *Id.* § 177(b); *Model Penal Code*, §§ 2.09, 3.02.

prosecution must bear the burden of persuasion to disprove the duress defense. To hold otherwise would allow the prosecution to obtain a conviction even when the jury concludes that the defense raises a reasonable doubt about the defendant's guilt. Even if this Court holds that the Fifth Circuit's rule does not violate the Due Process Clause, the reasoning of the common law courts remains persuasive.

The legitimacy of criminal convictions turns upon the prosecution's duty to rebut an accused's presumed innocence by demonstrating beyond a reasonable doubt that the accused both committed the act *and* is responsible for her actions. See *In re Winship*, 397 U.S. at 363-64 (it is "indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

Practical considerations also support the common law rule. Differing instructions create an unacceptable risk that a jury will be confused and thereby apply the wrong burden of proof when determining guilt. *Mitchell*, 725 F.2d at 836. Risk of even greater confusion exists in trials involving multiple charges and a duress defense negates an element of one charge, and is raised as to another charge where duress is not considered to negate an element.[37] In that case a jury would be asked to apply different standards of proof with respect to the duress defense in determining guilt on the various charges, even though the factual basis of the defense may remain the same and the charges arise out of the same conduct. In addition, having a reasonable doubt standard for a duress defense will lessen the risk that a jury will convict solely because of the failure of defense evidence, irrespective of the strength of the prosecution's case on the charged

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[37] *Compare Ninth Circuit Pattern Jury Instructions, Criminal*, § 6.5 (2003) (To Refute Element of Offense), *with id.* § 6.6 (Legal Excuse).

offense. See *United States* v. *Burse*, 531 F.2d 1151, 1153 (2d Cir. 1976) (reversible error in federal prosecution to refuse defendant's request for a jury instruction that, even if alibi witnesses are disbelieved, burden of proof remains with the government).

2. State Courts Overwhelmingly Place The Burden Of Persuasion For The Duress Defense On The Prosecution.

Although states vary in their allocation of the burden of proof when defendants assert a duress defense, the vast majority of state courts have chosen not to shift the burden of proof. Twenty-nine states have made the reasoned judgment that the prosecution should retain the ultimate burden of proof.[38] Each jurisdiction, pursuant to a variety of standards,

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[38] *Haywood* v. *State*, 190 So. 2d 725 (Ala. Ct. App. 1966); *Bailey* v. *People*, 630 P.2d 1062 (Colo. 1981); *State* v. *Rouleau*, 528 A.2d 343, 345 (Conn. 1987); *Smith* v. *State*, 826 So. 2d 1098 (Fla. Dist. Ct. App. 2002); *Wright* v. *State*, 442 So. 2d 1058 (Fla. Dist. Ct. App. 1983); *Aleman* v. *State*, 489 S.E.2d 867, 869 (Ga. Ct. App. 1997); *State* v. *Canelo*, 924 P.2d 1230, 1235-36 (Idaho Ct. App. 1996); *People* v. *Pegram*, 504 N.E.2d 958 (Ill. App. Ct. 1987); *Wolfe* v. *State*, 426 N.E.2d 647 (Ind. Ct. App. 1981); *State* v. *Hibdon*, 505 N.W.2d 502 (Iowa Ct. App. 1993); *State* v. *Hunter*, 740 P.2d 559 (Kan. 1987); Ky. Rev. Stat. Ann. §§ 501.090, 500.070; *State* v. *Glidden*, 487 A.2d 642 (Me. 1985); *Herd* v. *State*, 724 A.2d 693 (Md. Ct. Spec. App. 1999); *Commonwealth* v. *Robinson*, 415 N.E.2d 805 (Mass. 1981); *People* v. *Terry*, 569 N.W.2d 641 (Mich. Ct. App. 1997); *State* v. *Charlton*, 338 N.W.2d 26, 30-31 (Minn. 1983); *West* v. *State*, 725 So. 2d 872, 887-88 (Miss. 1998), *abrogated on other grounds by Jackson* v. *State*, 860 So. 2d 653 (Miss. 2003); *State* v. *Romano*, 809 A.2d 158 (N.J. Super. Ct. App. Div. 2002); *State* v. *Castrillo*, 819 P.2d 1324 (N.M. 1991); N.M. R. Cr. UJI § 14-5130; Okla. Stat. tit. 21, § 156 (1992); *Spunaugle* v. *State*, 946 P.2d 246 (Okla. Crim. App. 1997); *State* v. *Boldt*, 841 P.2d 1196, 1197 (Or. Ct. App. 1992) (citing *State* v. *Matthews*, 569 P.2d 662, 663 (Or. Ct. App. 1977)); *Commonwealth* v. *Barnes*, 162 A. 670, 678 (Pa. Super. Ct. 1932); *State* v. *Verrecchia*, 766 A.2d 377 (R.I. 2001); *State* v. *Rome*, 452 N.W.2d 790 (S.D. 1990); *State* v. *Culp*, 900 S.W.2d 707 (Tenn. Crim. App. 1994); *State* v. *Starks*, 627 P.2d 88, 92 (Utah 1981); *Moes* v. *State*, 284 N.W.2d 66 (Wis. 1979); In three states,

does impose a burden of production upon defendants to place the defense at issue in the case. The prosecution is then obligated to disprove the defense and bear the risk of non-persuasion. The majority view among the states hews to the principle that criminal trials serve as a test of the state's proof of guilt beyond a reasonable doubt.

Fourteen states impose upon the defendant the burden to establish a defense of duress or coercion by the traditional civil standard of preponderance of the evidence.[39] In general, these states have created a two-step process for fact finders. First, a fact finder must determine if the state has proven the defendant's guilt beyond a reasonable doubt. Second, the fact finder has to decide if the defendant has established by a preponderance of the evidence that his or her guilt should be excused (*i.e.*, their conduct is justified) because of duress. Prior to this Court's decisions in *Mullaney* v. *Wilbur*, 421

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the defendant's burden is simply to establish a reasonable doubt that the charged conduct was the result of a free will. *People* v. *Graham*, 129 Cal. Rptr. 31 (Cal. Ct. App. 1976); *Graham* v. *Commonwealth*, 525 S.E.2d 567 (Va. Ct. App. 2000); *State* v. *Tanner*, 301 S.E.2d 160 (W. Va. 1982).

[39] *See* 1 LaFave, *supra*, § 1.8(c) n.64 (lists Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Maine, Missouri, New Hampshire, New York, North Dakota, Oregon, Tennessee and Texas as burden-shifting states for affirmative defenses); *see also*, Alaska Stat. §§ 11.81.440, 11.81.900(b) (statutorily defining affirmative defenses to mean that the defendant has the burden of establishing the defense by a preponderance of the evidence); Ark. Code Ann. §§ 5-2-208, 5-1-111(d) (requiring the defendant to prove an "affirmative defense" by a preponderance of the evidence); Del. Code Ann. tit. 11, §§ 431, 304; Haw. Rev. Stat. §§ 702-231, 701-115(2)(b); La. Rev. Stat. Ann. § 14:18(6); Mo. Rev. Stat. §§ 562.071, 556.056; *Roberts* v. *State*, 195 N.W. 114, 115 (Neb. 1923) (holding that where a defendant "interposes a plea of duress, the burden is not on the state to disprove such plea, but is on the defendant to maintain his plea by a preponderance of the evidence"); N.Y. Penal Law §§ 40.00, 25.00(2); N.D. Cent. Code §§ 12.1-05-10, 12.1-01-03(3); Ohio Rev. Code Ann. §§ 2905.01, 2905.05; *Takacs* v. *Engle*, 768 F.2d 122 (6th Cir. 1985); Tex. Penal Code Ann. §§ 8.05, 2.04; *State* v. *Riker*, 869 P.2d 43 (Wash. 1994); and Wash. Rev. Code § 9A.16.060.

U.S. 684 (1975); *Patterson* v. *New York*, 432 U.S. 197 (1977), seven states shifted the burden of persuasion to the defendant.[40] Currently, only an additional seven states have followed suit. The fourteen states include Alaska, Arkansas, Delaware, Hawaii, Louisiana, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Texas, and Washington.[41] The last state to impose a substantive burden on the defendant was Arizona, in 1997. It did so by statute..[42] In approving the shift of burden from the state to the defendant, Arizona imprecisely treated all affirmative defenses the same (*e.g.*, insanity, self-defense, entrapment) and thereby avoided reaching a determination as to whether the duress defense in Arizona negates an element of the crime or excuses otherwise criminal conduct. *State* v. *Jeffrey*, 50 P.3d 861, 863 (Ariz. Ct. App. 2003). In sum, states have chosen at a rate of 2:1 that juries should be instructed that the state bears the burden to disprove duress after a defendant satisfies its burden of production.

3. In Recent Years A Small Number Of Circuit Courts Have Unjustifiably Placed The Burden Of Persuasion On The Defendant.

Even though this Court has more than once recognized that the unmistakable trend in American Jurisprudence has been to place the burden of persuasion on the prosecution to disprove

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[40] *See* J. Jeffries, Jr. & P. Stephan, III, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 Yale L.J. 1325, 1399 (1979) (appendix listing Alaska, Arkansas, Delaware, Georgia, Missouri, New York and Texas as burden-shifting states).

[41] *See supra*, note 47.

[42] *See* Ariz. Rev. Stat. § 13-205 (1997) (compelling a defendant to prove any affirmative defense raised by a preponderance of the evidence, including any justification defense such as duress). Prior to the enactment of section 13-205, Arizona did not shift the burden; once the duress defense had been raised, the state bore the burden to prove the defendant's conduct was not a result of duress. *See State* v. *Barrios*, 781 P.2d 624 (Ariz. 1989).

an affirmative defense beyond a reasonable doubt, *Patterson*, 432 U.S. at 208 (citing W. LaFave & A. Scott, *Criminal Law*, § 8, at 50 (1972) and C. McCormick, *Evidence*, § 341, at 800-02 (2d ed. 1972)); *Martin*, 480 U.S. at 232; even though all of the federal courts of appeals to address the issue had placed the burden of persuasion on the government to disprove duress; and even though the law in the Ninth Circuit apparently had been well-settled since *Hearst* was decided in 1977, the Ninth Circuit reversed course. This change was the sole basis upon which the Fifth Circuit based its opinion.

In 1991, the Ninth Circuit decided *United States* v. *Dominguez-Mestas*, 929 F.2d 1379 (9th Cir. 1991). In *Dominguez-Mestas*, the defendant was indicted for importing heroin into the United States, possession of heroin with the intent to distribute and making false statements. The defendant asserted that he was under duress when he committed the offenses and sought to have the jury charged that the prosecution must prove the non-existence of duress beyond a reasonable doubt. On appeal, the defendant argued that contrary to well-established Ninth Circuit precedent, the district court required him to prove duress by a preponderance of the evidence. The Ninth Circuit decided that *Hearst*, and its progeny, *Gonsalves* and *Guess*, were really only dicta and did not establish a rule of practice in that circuit. *Id.* at 1383. The court concluded that because "duress does not involve refutation of any of the elements of the offense we conclude that it is proper to place the burden of proving that defense by a preponderance of the evidence on the defendant." *Id.* at 1384. The only rationale offered by the Ninth Circuit panel was that to "require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy." *Id.*[43]

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[43] The Ninth Circuit has continued to follow the decision in *Dominguez-Mestas*. *United States* v. *Fei Lin*, 139 F.3d 1303, 1307 (9th Cir. 1998); *United States* v. *Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999).

The Fifth Circuit did not adopt a rule regarding the burden of persuasion on a duress defense until its decision in *United States* v. *Willis*, 38 F.3d 170 (5th Cir. 1994). The Fifth Circuit's entire holding in *Willis* on the burden of proof issue is as follows:

> Since a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant. *Gant*, 691 F.2d at 1165. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence.

Id. at 179. A footnote to the above quotation cited the Ninth Circuit's opinion in *Dominguez-Mestas*. The Fifth Circuit's citation to *Gant* is wholly inapposite as that case did not address the burden of proof.[44] Accordingly, the Fifth Circuit engaged in little or no analysis in deciding to adopt its rule and failed to even acknowledge that other circuits had reached a different conclusion.

In 2000, the Eleventh Circuit addressed the issue for the first time in *United States* v. *Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In *Deleveaux*, the defendant was charged with unlawfully possessing a firearm because he was a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Deleveaux* contended that he was justified in briefly possessing the firearm because his family and his home were under attack by an assailant with a gun.[45] The Eleventh Circuit held that

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[44] While *Gant* does set out the elements of a necessity or duress defense, nowhere does it hold, or even discuss, where the burden of proof for such a defense should lie. *Gant*, 691 F.2d at 1165.

[45] Although the court considered the felon in possession of a firearm statute to be a "strict liability" offense, it held that the defense of justification may be available to such a charge. *Deleveaux*, 205 F.3d at 1297. The Court also concluded that justification does not negate any element of the statute, but serves only as the legal excuse for the criminal act because the defense is based upon additional facts and circumstances that are distinct from the conduct constituting the underlying offense.

because "justification is an affirmative defense, the district court properly required *Deleveaux* to prove justification by a preponderance of the evidence." *Deleveaux*, 205 F.3d at 1299. The Eleventh Circuit expressly relied on *Willis* and *Dominguez-Mestas* and specifically declined to follow the Seventh Circuit's decision in *Talbott*, 78 F.3d at 1186, which involved the same charges.[46] Ultimately, the *Deleveaux* court reasoned that the defense will usually be best situated to produce evidence relating to each element of an affirmative defense and such evidence would often "be difficult, if not impossible for the government to obtain. Under these circumstances, requiring the government to disprove justification beyond a reasonable doubt would place an unrealistic burden on the government, which fairness to the defendant does not require." 205 F.3d at 1300. In reaching its decision, the Eleventh Circuit neither considered nor acknowledged its previous rulings that for certain affirmative defenses, the accused has the burden of producing evidence to support the defense and then the prosecution has the burden of disproving the defense beyond a reasonable doubt.[47]

Following the Eleventh Circuit's ruling, the Third Circuit resolved the same question and relied upon the reasoning of

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[46] The Eleventh Circuit disagreed with the Seventh Circuit's reasoning that an express statutory allocation of the burden of proof is required to shift to the defendant the burden to prove an affirmative defense. The Eleventh Circuit believed that implicit in the Seven Circuit's reasoning was the assumption that all affirmative defenses negate an element of the offense charged. 205 F.3d at 1299-1300.

[47] *See Alvarez*, 755 F.2d at 842 n.12 (holding that in a federal prosecution, once the defendant has met the burden of production of facts in support of self-defense, the government has the burden of persuasion to negate self-defense beyond a reasonable doubt); *United States* v. *Kloess*, 251 F.3d 941, 948 (11th Cir. 2001) (in an obstruction of justice prosecution where the statute provides for a defense, the defendant has the burden of going forward with sufficient evidence to raise the defense, but the ultimate burden of persuasion remains with the prosecution to disprove the defense beyond a reasonable doubt).

the Eleventh Circuit, but issued a more limited ruling that distinguished but did not alter the common law respecting duress or coercion defenses.[48]

Only the Fifth, Ninth and Eleventh Circuits have held that the defendant bears the burden of persuasion to prove a duress defense. All three rely upon a flawed rationale supporting a burden-shifting rule; namely, that the defendant will usually be best situated to produce evidence of duress so that there is a "manifest disparity in convenience of proof and opportunity for knowledge" which would make it nearly impossible for the prosecution to disprove duress beyond a reasonable doubt.

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[48] *United States* v. *Dodd*, 225 F.3d 340 (3rd Cir. 2000), also involved a justification defense (the defendant picked up a gun left on the street in order to keep it out of the hands of nearby children) to a felon in possession charge under 18 U.S.C. § 922(g)(1). The Third Circuit found this to be a question of federal common law for which there was no binding precedent in the Third Circuit or from the Supreme Court. The Third Circuit did recognize that the Seventh Circuit, in *Talbott*, and the Eleventh Circuit in *Deleveaux*, had addressed the same issue and reached different conclusions. The Third Circuit agreed with the Eleventh Circuit that the burden of persuasion on a justification defense to a felon in possession charge should be upon the defendant. 225 F.3d at 350. However, the Third Circuit made clear that it was deciding only who should bear the burden of persuasion on a justification defense to a felon in possession charge, "not the more general question of the placement of the burden of persuasion on affirmative defenses that do not negate an element of the offense." *Id.* at 346-47. The Court also stated that it did "not believe that the duress or coercion cases are sufficiently similar to the justification scenario so as to be dispositive of this case, even were these duress and coercion cases to be uniform in their allocation of the burden of persuasion." *Id.* at 349 n.6. Earlier, the Third Circuit had refused to shift the substantive burden of proof to the defendant in a coercion case. *United States* v. *Santos*, 932 F.2d 244 (3rd Cir. 1991). "[T]o the extent that the charges against a defendant require the government to prove that the criminal acts were done with criminal intent, the government should from the outset bear the burden of disproving duress beyond a reasonable doubt once the defendant has introduced sufficient evidence concerning each element of the defense." *Id.* at 249.

Deleveaux, 205 F.3d at 1300; *Dominguez-Mestas*, 929 F.2d at 1384; *Willis*, 38 F.3d at 179 n.12.

This Court has expressly rejected this rationale. In *Tot* v. *United States*, 319 U.S. 463, 469 (1943), the Court explained that a defendant's greater familiarity with the facts, or his consequent ability to obtain information, cannot, standing alone, justify imposing the burden of persuasion upon the defendant. *Id.* The rationale proves too much in that it would justify placing the burden of proof upon all criminal defendants. *Id.* at 469.

A defense of duress or coercion necessarily involves the actions of others and a particular set of observable circumstances. While the reasonableness of a particular defendant's perceptions of those circumstances may be at issue (as here, where the defense sought to demonstrate the effects of domestic abuse upon the judgment of a female victim), prosecutors have ample opportunity to demonstrate to the jury that neither the actions of others nor the circumstances at hand were sufficiently coercive or threatening to render the defendant's actions reasonable. Moreover, trial courts, acting as evidentiary gate-keepers pursuant to Fed. R. Evid. 401-403, and as arbiters of proper instructions pursuant to Fed. R. Crim. P. 30(b), need not permit defendants to present evidence that is not sufficiently probative or give instructions where the defense has not satisfied its burden of production. See *Bailey*, 444 U.S. at 416 (affirming district court's refusal to give duress instruction on the ground that defendants had not made "threshold showing" in support of the instruction). The concerns that the Ninth Circuit expressed in *Dominguez-Mestas*, 929 F.2d at 1384 regarding persons who "cannot be located" or are "not subject to subpoena power" are therefore groundless.

The instant case highlights the paucity of the rationale supporting the burden shifting rule. Here, prosecutors had ample notice and opportunity to investigate, to cross-examine

petitioner's witnesses and even to evaluate petitioner's abuse claims using their own expert. Prosecutors investigated petitioner by searching her home, contacting her apartment manager, investigating her residential history, investigating her children's schools and even checking the records of the jail where petitioner was in custody. Here also, prosecutors had access to Wright, her principal abuser, and to Hillary, one of his accomplices. Both were present and in custody, pursuant to writs ad testificandum, at the same federal building in which petitioner's trial was held. Both had previously given statements to the ATF Agent. JA 731-41. Thus, the prosecution's decision to call neither to the stand to rebut petitioner's duress defense was its own.

Accordingly, the prosecution in this case utilized the same tools and techniques that any party uses to prepare and try a case in the courtroom. As in any other case, the prosecution has substantial resources that allow it to investigate facts and circumstances, find and present witnesses, and to present the results of their efforts to a jury. In short, duress cases present no special burden upon the prosecution that is not already present in any defense that controverts a *mens rea* element.[49]

At best, the rationale offered by the Fifth, Ninth, and Eleventh Circuits supports a rule that requires the defendant to bear the burden of production in support of the duress defense. That is the rule in every circuit to have addressed the question. Petitioner is not opposed to such a rule, and recognizes that the prosecution cannot be responsible for producing evidence and disproving every possible contingency in a criminal case. Therefore, it is certainly fair that the defendant be responsible for putting forth sufficient evidence to support her defense before the jury can be

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[49] Even where the defendant is the only witnesses to claimed duress or coercion, the prosecution's opportunity to cross-examine affords it access to the most knowledgeable witness and provides ample opportunity to impeach.

instructed on the defense. What is neither justified in accordance with the development of the common law, nor reasonable, is a rule that converts the jury's assessment of the evidence in support of her duress defense into a civil trial. Accordingly, this Court should adopt the majority rule prohibiting such burden shifting in duress cases to govern all federal trials.

II. THE FIFTH CIRCUIT'S BURDEN-SHIFTING RULE VIOLATES FIFTH AMENDMENT DUE PROCESS PROTECTIONS.

This Court's opinion in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), holds that the Due Process Clause forbids shifting the burden of persuasion to the defendant on an element of the offense. See also *Davis* v. *United States*, 160 U.S. 469 (1895), *In re Winship*, 397 U.S. 358 (1970), and *Patterson* v. *New York*, 432 U.S. 197 (1977). The Court explained that shifting the burden of persuasion of an element of the offense places a great strain on the defendant because "he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact." 421 U.S. at 702 n.31. Moreover, shifting the burden of persuasion on a "critical fact in dispute" increases further the likelihood of an erroneous murder conviction. *Id.* at 701. Petitioner's duress defense controverted the *mens rea* required for conviction and thus, shifting the burden of persuasion to petitioner required petitioner to bear the burden of proof with regard to the *mens rea* component of the charged crimes.

This Court has long held that *mens rea*, as a component of the prosecution's burden in criminal cases, cannot be separated from the "universal and persistent . . . belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *Morissette*, 342 U.S. at 250); see also *Liparota* v. *United States*, 471 U.S. 419, 425-26 (1985) (same). Thus, "the

consequent ability . . . to choose between good an evil" is a fundamental component of the intent element of crimes.

The logical corollary to the Court's expositions of *mens rea* is that where the will is overborne, or the defendant has otherwise been deprived of the ability to choose for herself, then the roots of *mens rea* have been cut. Or, put differently, *mens rea* presupposes freedom of choice and, *a fortiori*, without a free choice, there can be no *mens rea*. Accordingly it defies reason to speak of a defendant who possessed the necessary *mens rea*, but is nonetheless not guilty because another person deprived the defendant of the choice not to commit the act.

Moreover, in assessing what constitutes an element of a particular crime "the relevant inquiry is one not of form, but of effect." *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000). Plainly the effect of raising a duress defense is to dispute the prosecution's claim that the defendant's actions were the product of her own intentions. The defense therefore goes to the core premise of the *mens rea* element, that the desire to commit a criminal act was the product of a free choice.

It is no answer to the stark principle that a duress or coercion defense negates *mens rea* to claim that the cases from which this principle is drawn involved a heightened means rea element, or "specific intent" that required the prosecution to demonstrate that the defendant acted with an evil mind as opposed to acting with mere intention or in the absence of mistake or accident. The criminal statutes at issue in *Morissette* and *Liparota* specified only that the offense must be committed knowingly. See *Morissette*, 342 U.S. at 248 (addressing 18 U.S.C. § 641, which provides that "'whoever embezzles, steals, purloins, or *knowingly* converts' government property is punishable by fine and imprisonment" (emphasis added)); see also *Liparota*, 471 U.S. at 419, 420 (addressing the Food Stamp Act of 1964, 7 U.S.C. § 2024(b)(1) and whether the "defendant *knew* that his

acquisition or possession of food stamps was in a manner unauthorized by statute or regulations" (emphasis added)). The Court's opinion in *Staples*, 511 U.S. at 602, 603, concerned a statute, 26 U.S.C. § 5861(d), that specifies no level of intent. In sum, these cases in no way stand for the proposition that a broad conception of *mens rea* – one which a duress defense controverts – is limited only to crimes with a heightened *mens rea* or specific intent.

The vast bulk of petitioner's charges (Counts Two through Nine) alleged violations of 18 U.S.C. § 922(a)(6) which forbids "*knowingly* [making] any false or fictitious oral or written statement . . . with respect to any fact material to the lawfulness of the sale" (emphasis added).[50] The remaining count, Count One of petitioner's indictment charged a violation under 18 U.S.C. § 922(n) (possession of a forearm while under indictment) which requires a showing that she "willfully" violated a prohibition on the receipt of a firearm by a person under indictment. *Id.* § 924(a)(1).

Affirmative defenses that present evidence of an overborne will (duress), or of the absence of a lawful alternative choice (self-defense, necessity), thus traverse the *mens rea* element by demonstrating that the core component of *mens rea*, freedom of choice, was absent. Indeed, alleged imperfections in these defenses go to the very same issues of autonomy and choice. For example, a demonstration that there was no casual connection between the criminal action taken and avoidance of the threatened harm will defeat a claim of duress (Model Penal Code § 3.02(1), (2) (1974)), and the absence of a reasonable threat will defeat a claim of self-defense. In either instance, the imperfection demonstrates that the defendant's actions were not solely governed by circumstances

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[50] *See also* 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.")

interposed by other others, but by the defendant's own misperceptions.

Under the Fifth Circuit's procedure, the issue was not whether petitioner's duress evidence created a reasonable doubt, but whether it demonstrated, by a preponderance of evidence, that she was under duress. This relieved the prosecutors of their *Winship* burden to prove to the jury beyond a reasonable doubt that the defendant's actions were hers alone. Instead, the prosecutors here needed only rebut the defendant's evidence sufficiently to permit jurors to conclude that it was more likely than not that the defendant acted of her own accord. On this question the jury was to treat the matter as if it were a civil trial, with the presumption of innocence lost by virtue of the fact that the jury was told that petitioner had to persuade them of her lack of criminal intent.

The Court's existing decisions permitting burden shifting are distinct in that each involve significant deference to state statutes expressly shifting the burden of proof on specific affirmative defenses. See *Leland* v. *Oregon*, 343 U.S. 790 (1952), *Martin* v. *Ohio*, 480 U.S. 228 (1987), and *Patterson* v. *New York*, 432 U.S. 197 (1977). Nonetheless this is not a ground to distinguish them, given that the due process principle described above must operate to the same effect in both federal and state courts. Each case attempts to avoid the argument that the prosecution has been relieved of proving its case beyond a reasonable doubt by contending that the affirmative defense at issue and the elements of the crime charged did not "overlap." *E.g.*, *Martin*, 480 U.S. at 234. These contentions fail, to the extent that each of the defenses at issue in fact addressed the *mens rea* component of the crime.[51] Because due process requires that the substantive

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[51] The dissent in *Leland* pointed out that Oregon's law violated due process because it required "the accused to prove . . . the absence of one of the essential elements for the commission of murder, namely, culpability."

burden of proving any defense addressing a *mens rea* component cannot be imposed on the defense, these decisions must be limited with respect, at least, to duress or coercion defenses

The opinion in *Martin* v. *Ohio* attempts to avoid the holding of *Winship* by observing that the jury's instructions did not exclude consideration of the self-defense evidence in deciding whether the prosecution had proven its case beyond a reasonable doubt. But that effort is inconsistent with other decisions of this Court, 480 U.S. at 238 n.1 (Powell, J., dissenting) and, as discussed above, with common sense. When instructed to deal with a certain class of evidence in a certain specific way, jurors must be presumed to do so. Further, as the dissent observes, the majority opinion cannot blithely ignore the significance of the fact that evidence in support of self-defense may negate the element of purposefulness. *Mullaney*, *Winship* and even *Patterson* unequivocally hold that where a defense serves "to negative any facts of the crime which the state is to prove in order to convict" the burden may not be shifted. *Patterson*, 432 U.S. at 197. For these reasons, the reasoning of *Martin* v. *Ohio* cannot stand.

At bottom, the duress defense traverses a fundamental component of *mens rea*, freedom of choice. Because the Due Process Clause requires that the prosecution must prove each and every element, including *mens rea*, beyond a reasonable doubt, no court can constitutionally relieve the prosecution of that burden in a duress case by shifting the burden to the defense on this specific issue. Accordingly, the Court should reverse the Fifth Circuit's opinion as violative of Due Process.

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343 U.S. at 804 (Frankfurter, J. dissenting). Similarly, in *Martin* v. *Ohio*, the dissent explained that self-defense disputes the element of "prior calculation and design" in Ohio's aggravated murder statute. 480 U.S. at 238-39 (Powell, J. dissenting).

III. THE ERROR COMMITTED IN THIS CASE WAS STRUCTURAL AND REQUIRES AUTOMATIC REVERSAL.

This case involves a "structural error" that requires automatic reversal. See *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (explaining that a "structural" error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"). Allocations of burden of proof affect the substantial rights of a criminal defendant in that they fundamentally affect the manner in which a fact finder assesses and weighs evidence. In this case, the preponderance of the evidence jury instruction converted the trial from a criminal to a civil trial on the issue of *mens rea*. The prosecution was thus relieved of its burden to prove petitioner's guilt beyond a reasonable doubt. Therefore, the error in this case infected the entire trial process and can not meaningfully be subjected to a harmless error analysis.

As this Court has explained, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). Thus, any attempt to determine what the jury would have done if the trial court had properly instructed them on the reasonable doubt standard requires "pure speculation." *Id.* Petitioner was denied her right to a jury verdict of guilt beyond a reasonable doubt and that error "unquestionably qualifies as 'structural error.'" *Id.* at 281-82.

Even if this Court finds that the error in this case does not fit into the limited class of "structural" error cases, the Court must still overturn the conviction because the prosecution can not demonstrate that the error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); Fed. R. Crim. P. 52(a) ("[a]ny error, defect, irregularity or variance which does not affect substantial rights shall

be disregarded."). In order to meet its burden, the prosecution must show that there is no reasonable possibility that the error contributed to the defendant's conviction. *Chapman*, 386 U.S. at 24. It cannot do so. Where, as here, a court allocates the substantive burden of proof to an accused to prove her duress defense by a preponderance of evidence, the prosecution is relieved of its burden to demonstrate the *mens rea* component of the charged crime beyond a reasonable doubt. More general instructions to a jury that the prosecution bears the ultimate burden of proof, that the accused is innocent until the prosecution proves her guilty, and that the jury may acquit if it finds reasonable doubt as to any of the charged elements cannot cure this error. Taken as a whole such instructions risk, at a minimum, juror confusion. That is because the more general instructions are in irresolvable tension with a more specific instruction to the jury that it is to handle the evidence concerning duress in a specific fashion.

The instructions here allowed the jury to acquit on the basis of her duress evidence only if that evidence rose to the level of preponderance; that is, only if that evidence persuaded the jury that it was more likely than not that she was acting under duress. The jury was also instructed that it could acquit if it found reasonable doubt as to any element of the crime charged. JA 305. Because duress defenses necessarily controvert the *mens rea* component of crimes, the jurors could not reasonably weigh the duress evidence under both standards. When a court gives a specific instruction with regard to the jury's weighing of a certain type of evidence, it is logical that jurors will follow that specific instruction with regard to that specific evidence. Accordingly, any attempt by one juror to contend that the petitioner's duress evidence created reasonable doubt would be countered by other jurors with a reference to the court's specific instruction as to that

defense.[52] Because courts presume that jurors follow their instructions, see *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), it must be assumed that jurors have done so with respect to the specific instruction on the duress evidence.

Even under the Fifth Circuit's stringent definition of the duress defense, the District Court found that petitioner had

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[52] The following hypothetical deliberation among jurors illustrates the potential for juror confusion that the instructions created and the substantial likelihood that the error affected the outcome of this case.

Juror A: I have some real doubt about whether she is guilty. I think is quite possible that her boyfriend made her do this and that she did not herself want to do this at all.

Juror B: So you are saying you believe her duress defense?

Juror A: Well, I'm not saying I think it's for sure that the boyfriend made her do it, but I think that's quite possible given her testimony and the situation that she was in with these bad guys.

Juror B: OK, then, so are you convinced that she wasn't responsible for her actions? Because our jury instruction says that in order to find her not guilty because of the duress, we have to find it more likely than not that she was under duress.

Juror A: I don't know that I'm totally convinced in that way. But I've got concerns.

Juror B: Concerns aren't enough. The instruction says we have to be persuaded by a preponderance of the evidence.

Juror A: I don't suppose that her evidence is all that strong.

Juror B: Then her defense doesn't work.

Juror A: I guess that's right.

Plainly, Juror A's reasonable doubts – based solely on the defense evidence of duress – are trumped by the specific instruction on that defense. Yet the prosecution has not made its case as to the defendant's criminal intent beyond a reasonable doubt. Thus, "'when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside.'" *Martin*, 480 U.S. at 238 n.1 (Powell, J., dissenting) (quoting *Francis* v. *Franklin*, 471 U.S. 307, 323 n.8 (1985)).

adduced sufficient evidence to warrant a specific instruction on her defense. JA 290. That evidence came not only from petitioner, but also from her teenage daughters. Even the evidence adduced by the prosecution tended to support petitioner's claim of duress. The prosecution's evidence indicated that her environment was a violent one, that she was in the constant company of other individuals (those whom she claimed were abusing her and her daughters), and that these same individuals accompanied her to both gun shows and at each purchase or attempted purchase. JA 63, 65, 68-69, 71-72, 76-78, 78-79, 81-82, 91, 92-94, 99-101, 102, 103; SF 207-08. The prosecution's evidence also indicated that the guns were not hers in so far as none were found following a search of her apartment. SF 262. Taken as a whole, the evidence of duress was sufficient to create a reasonable doubt as to her guilt of the charged offenses.

Petitioner also attempted to present additional evidence in support of her defense, principally the testimony of an expert on domestic violence who would have testified to the affects of such violence and the threat of violence on the reasoning and judgment of women who are victimized at the level that petitioner was. The District Court improperly excluded that evidence, SF 727, as well as statements against penal interest made by her abusers who were felons. SF 723-25. Those statements, given to an ATF agent, were admissions that they had purchased guns through petitioner. Def. Ex. 6; SF 731-33.

Petitioner's duress defense was her sole defense at trial. Because her duress evidence was sufficient to warrant an instruction, JA 290, and because the instruction given to the jury was an error affecting her fundamental rights, there is a reasonable possibility that the error contributed to the

outcome.[53] *Chapman*, 386 U.S. at 24. Thus, the error in this case was not harmless.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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[53] Even under the more stringent harmless error standard for non-constitutional errors (*i.e.* whether it is highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict), the conviction can not stand. *See Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946).

APPENDIX

UNITED STATES STATUTES

18 U.S.C. § 17. Insanity defense

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed

manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this

paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless—

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed

manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a

rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are .....

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by

the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who[1] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to

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[1] So in original. The word "who" probably should not appear.

the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor

or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the

component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection—

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is—

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or

any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which—

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the[2] House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

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2 So in original. Probably should be "of the".

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from

importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to—

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless—

(A) after the most recent proposal of such transfer by the transferee—

(i) the transferor has—

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that—

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only—

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee—

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who—

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in

section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to—

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law—

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless—

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall—

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if—

(A)(i) such other person has presented to the licensee a permit that—

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to—

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile—

(i) in the course of employment, in the course of ranching or farming related to activities at the

residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except—

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who

possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas—

(1) Definitions.—In this subsection—

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.—Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is—

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is—

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver—

(A) Conditions for waiver.—Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if—

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.—Each petition under subparagraph (B) shall—

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.—The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner—

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

[APPENDIX A Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

REPEAL OF SUBSEC. (P)

<Pub.L. 100-649, § 2(f)(2)(A), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1(1), Dec. 9, 2003, 117 Stat. 2481, provided that, effective 25 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of

Pub.L. 100-649, set out as a note under this section], subsec. (p) of this section is repealed.>

ENACTMENT OF SUBSEC. (Z)

<Pub.L. 109-92, § 5(c)(1), (d), Oct. 26, 2005, 119 Stat. 2099, 2101, provided that, effective 180 days after October 26, 2005, subsec. (z) of this section is enacted to read as follows:>

<(z) Secure gun storage or safety device.—>

<(1) In general.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.>

<(2) Exceptions.—Paragraph (1) shall not apply to—>

<(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or>

<(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or>

<(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);>

<(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or>

<(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.>

<(3) Liability for use.—>

<(A) In general.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.>

<(B) Prospective actions.—A qualified civil liability action may not be brought in any Federal or State court.>

<(C) Defined term.—As used in this paragraph, the term "qualified civil liability action"—>

<(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—>

<(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and>

<(II) at the time access was gained by the person not so authorized, the handgun had

been made inoperable by use of a secure gun storage or safety device; and>

<(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.>

18 U.S.C. § 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense

under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a

crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in

relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure,

forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by

clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions

different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign

commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

AMENDMENT OF SECTION

<Pub.L. 100-649, § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 101-647, Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1, Dec. 9, 2003, 117 Stat. 2481, provided that, effective 25 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under 18 U.S.C.A. § 922], subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter"; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesig-nated as subsecs. (f) through (n), respectively.>

AMENDMENT OF SUBSEC. (A)(1) -

<Pub.L. 109-92, § 5(c)(2)(A), (d), Oct. 26, 2005, 119 Stat. 2100, 2101, provided that, effective 180 days after October 26, 2005, subsec. (a)(1) of this section is amended by striking "or (f)" and inserting "(f), or (p)".>

ENACTMENT OF SUBSEC. (P)

<Pub.L. 109-92, § 5(c)(2)(B), (d), Oct. 26, 2005, 119 Stat. 2100, 2101, provided that, effective 180 days after October 26, 2005, subsec. (p) of this section is enacted to read as follows:>

<(p) Penalties relating to secure gun storage or safety device.—>

<(1) In general.—>

<(A) Suspension or revocation of license; civil penalties.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—>

<(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or>

<(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.>

<(B) Review.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).>

<(2) Administrative remedies.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.>